Supreme Court of the United States

October Term, 1940.

No. 507

ATANASIO SITCHON,
Petitioner (Plaintiff),

vs.

AMERICAN EXPORT LINES, INC.,
Respondent (Defendant).

Petition for Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit and Brief in Support of Same.

WILLIAM MACY,
Counsel for Petitioner.

LODER APPEAL PRESS, INC., 65-67 Duane St., N. Y. C. Tel. WOrth-2-0689

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Supreme Court of the United States

OCTOBER TERM, 1940.

ATANASIO SITCHON,
Petitioner (Plaintiff),

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Respondent (Defendant).

No. .....

PETITION FOR WRIT OF CERTIORARI.

TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, ATANASIO SITCHON, plaintiff, respectfully prays for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit to review a judgment of that Court entered on August 20, 1940.

Opinions Below.

The opinion of the District Court for the Southern District of New York is printed at page 52 of the Record. The opinion of the Circuit Court of Appeals is reported in 113 Fed. (2d) 830.

Jurisdiction.

The date of the judgment to be reviewed is the date of the judgment of the Circuit Court of Appeals affirming the

decision of the District Court, made August 20, 1940. The statute giving jurisdiction is Section 240-A of the Judicial Code, Title 28 U. S. C. Section 347, as amended by the Act of February 13, 1925.

Summary and Short Statement of the Matter Involved.

Plaintiff, a seaman, while serving as a cook on board defendant's vessel, *S. S. Exchange*, was injured on June 10, 1938, by being struck on the head by the handle of a defective meat grinder. Plaintiff received treatment at the Marine Hospital in New York, and an abstract of the hospital record stated, among other things, (R., 20):

> "8/8/38—X-ray examination of skull shows slight increased density in the left supraorbital region, but no definite evidence of any fracture."

A neurological finding was made at that hospital on August 19, 1938, that (R., 46):

> "patient should be given a sedative, encouragement and advice to keep working."

Plaintiff, through his attorney, had made claim upon defendant, and in connection with settlement negotiations, plaintiff's attorney obtained the abstract and delivered it to defendant's claim agent (R., 20). Negotiations for settlement culminated on November 14, 1938, when plaintiff, through his attorney, settled his claim against the defendant for $180. At that time he executed a release under seal covering all his injuries known and unknown, present and future, for which defendant might be liable (R., 14).

Sometime later plaintiff was compelled to enter another Marine Hospital, where X-rays disclosed that he was actually suffering from a fractured skull with definite

brain injury (R., 27). Plaintiff was operated upon for these injuries in June, 1939 (R., 47). His impaired condition is permanent (R., 48, 9).

Plaintiff was misled by the inaccurate and misleading hospital report in making a settlement of $180 (R., 33-36). No claim is made of fraud or misrepresentation on defendant's part. Plaintiff thereupon brought the present action to recover for these injuries (R., 52), to which action defendant interposed a plea of the release in bar. Defendant then moved for judgment dismissing the complaint on the basis of this release (R., 2), and upon consideration of the affidavits submitted on both sides the District Court dismissed the complaint (R., 65).

The Circuit Court of Appeals (L. Hand, A. N. Hand and Chase, Circuit Judges), considered this case as one where both parties labored under a mistake regarding the injuries, but held, nevertheless, that the release could not be avoided for this mistake because plaintiff had had the advice of his own physician and attorney; and sought to distinguish its holding in the case at bar from its own prior decision in *Bonici* v. *Standard Oil Co.* (103 F. 2nd, 437), in which a similar release was set aside, upon the ground that in the *Bonici* case the seaman had acted upon the advice—honestly though erroneously given—of his employer's doctor.

The Circuit Court of Appeals also attempted to distinguish the case at bar from the decision of the Circuit Court of Appeals of the Tenth Circuit in *Tulsa City Lines, Inc.* v. *Mains* (107 F. 2nd 377) (where a release was set aside which had been executed by a passenger to the railroad company, the passenger acting upon incorrect statements made both by the doctor for the carrier and her own physician) saying that the holding in the *Tulsa* case was bad law for the reason that there the passenger had had the independent advice of her own physician and her counsel as well as the advice of the company's doctor.

While it is true that the doctor in the case at bar was not hired by defendant, it is equally true that he was not plaintiff's personal physician, but a doctor attached to the Marine Hospital where plaintiff received treatments after his injury.

Furthermore, the release, broad as it is in form, must be considered in connection with the erroneous hospital diagnosis upon which both plaintiff and defendant acted in negotiating the settlement (*Texas & Pacific Ry. Co.* v. *Dashiell,* 198 U. S. 521).

The form of the release—that is, the extraordinary repetition of words which in substance mean that the releasor is releasing known and unknown, present and future claims, cannot destroy the equities of plaintiff's case. If the release were in the usual form, *i. e.,* of all claims which the releasor now has or may hereafter have—there can be no question that, for the mistake induced by the hospital, the release would be avoided. True, defendant sought to make it clear that the release included every possible claim. That effort is understandable and no complaint can be made on that score. But, it is equally true that, when plaintiff executed such a release, he was informed that it was impossible for him to have the injury from which he in fact was actually suffering. True, also, that defendant did not cause the error; but that makes no legal difference. The diagnosis made by the hospital was one upon which plaintiff had the right to rely, and that is all that we are concerned with. Plaintiff had an *existing* injury. He was told that he did not have it. The representation of the non-existence of the skull fracture was directly responsible for the release for $180 of a claim for a permanent and dangerous injury (R., 35).

Question Raised by the Case.

Where a seaman is advised by a Marine Hospital after an accident that there is no sign of a skull fracture, and

he settles his claim against the ship-owner for $180, executing (while represented by an attorney) a release to the employer covering known and unknown injuries, may he rescind the release where he subsequently discovers that the hospital diagnosis which both he and his employer relied upon, was grievously inaccurate, and that he was actually suffering from a skull fracture and brain injury which permanently incapacitates him?

Reasons Relied on for the Allowance of the Writ.

Your petitioner respectfully prays that the writ be allowed for the following reasons:

1. Because the decision of the Circuit Court of Appeals for the Second Circuit is not only wrong in principle but is in conflict with the decisions of this court in *Texas and Pacific Railway Co.* v. *Dashiell,* 198 U. S. 521 and *Moffett, Hodgkins & Clark* v. *Rochester,* 178 U. S. 373.

2. Because the decision of the Circuit Court of Appeals is in direct conflict with the decision of that court in *Bonici* v. *Standard Oil Co.,* 103 Fed. (2) 437.

3. Because the decision of the Circuit Court of Appeals for the Second Circuit is in direct conflict with the decision of the Court of Appeals for the Tenth Circuit in *Tulsa City Line, Inc.* v. *Mains,* 107 Fed. (2) 377 and the decision of the Circuit Court of Appeals for the Ninth Circuit in *Great Northern Railway Co.* v. *Reid,* 245 Fed. 86.

Prayer.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of

this Honorable Court, directed to the Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be named therein, a full and complete transcript of the record and all proceedings of the case, numbered and entitled on its Docket No. 374—*Atanasio Sitchon,* Plaintiff-Appellant v. *American Export Lines, Inc.,* Defendant-Appellee, and that the said Decree of the Circuit Court of Appeals for the Second Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem just; and your petitioner will ever pray.

WILLIAM MACY,
Counsel for Petitioner.

Dated, New York, October 1, 1940.

Supreme Court of the United States

OCTOBER TERM, 1940

ATANASIO SITCHON,
Petitioner,
vs.
AMERICAN EXPORT LINES, INC.,
Respondent.
No. .....

Brief in Support of Petition for Writ of Certiorari.

The jurisdictional basis for the petition, a statement of the case, and the opinions of the courts below, are all stated in the petition, and, therefore, need not be repeated here.

Specification of Errors.

1. The decision of the Circuit Court of Appeals for the Second Circuit conflicts with opinions of this Court, and of other Circuit Courts of Appeal, in holding that a seaman is bound by a release of present and future injuries executed on the faith of a physician's report that he did not have the very injury which, after the release, he found himself to be suffering from.

Summary of Argument.

Where a seaman, claiming for personal injuries, is assured by a marine hospital physician that he has no skull fracture, and that a sedative and short rest will permit him to return to work and the doctor's report is before the seaman and employer during negotiations for a settlement of a personal injury claim, it is clear that that report is the basis of the settlement; that the seaman, if advised that he had a skull fracture and brain injury resulting in permanent physical impairment, would not have settled his claim on the basis of minor bruises. Therefore, the release executed by the seaman, no matter how comprehensive in form, must be taken to exclude skull fracture and brain injury. Where, then, the seaman subsequently discovers that the doctor's report was wrong, that he actually had a skull fracture and brain injury, the release must be set aside; any other result would be inequitable.

ARGUMENT.

I.

The principle for which petitioner contends was upheld by this Court in *Texas & Pacific Railway Co.* v. *Dashiell,* 198 U. S. 521. There, an injured railway employee who thought he had received slight bodily injuries and a scalp wound, executed a release to the company "from and against all claims, demands, damages and liabilities, of and from every kind or character whatsoever, for or on account of the injuries sustained by me in the manner or upon the action aforesaid, and arising or accruing, or hereafter arising or accruing in any way therefrom".

The release in that case specified the injuries which the employee had received. While it is true that in that

case this court stressed the words "for or on account of the injuries sustained", and held that they related to the specification of injuries embodied in the release, that case does stand for the proposition that for even a unilateral mistake a release may be rescinded where an unjust result would otherwise ensue.

In the case at bar, the erroneous hospital report was before plaintiff and defendant. The release executed by plaintiff impliedly recited the findings of the hospital. The result in *Texas* v. *Dashiell* (*supra*) would have been the same had the specification of injuries been contained in a separate letter. In the case at bar, if the erroneous hospital report had been physically incorporated in the release, the result would be the same as in the case cited—the release would have to be set aside. Therefore, in the case at bar, we must consider the broad wording of the release as limited by the contents of the hospital report; we must conclude that both plaintiff and defendant acted upon the assumption that no skull injury was or could be present. A skull injury is not a possible development from a minor injury. It is there at the time of the accident, or it can never result therefrom. A statement that there is no skull injury is a representation of an existing fact, and not a prognosis. The terrible mistake made by the hospital actually deceived both plaintiff and defendant. That deception, innocent though it was, caused this plaintiff to settle his claim for $180.

This erroneous hospital report must, then, be taken as part of the release, and this case comes squarely within the principle of the case cited.

The *Texas* v. *Dashiell* case (*supra*) applies whether we consider this case as one of mutual or unilateral mistake.

The subject of rescission of releases for unilateral mistake is discussed in Clark on Equity, Section 372; Williston on Contracts, Section 1540; and is thus stated in *Rosenblum* v. *Manufacturer's Trust Co.*, 270 N. Y. 79, at pages 84-5:

"The term 'mistake' may be used to cover all kinds of mental error, however induced * * *, and equity can interfere in a suit for cancellation or rescission to prevent the enforcement of an unjust agreement induced by a unilateral mistake of fact. A mistake not mutual but only on one side may be ground for rescinding but not for reforming a contract. (*Smith* v. *Mackin*, 4 Lans. 41, 44, 45; *Moffett, Hodgkins & Clarke Co.* v. *Rochester*, 178 U. S. 373.) If the erroneous transaction was such as to involve the act of the plaintiff only and the effect of the transaction would be the unjust enrichment of the defendant, the plaintiff is entitled to have the transaction rescinded, although he was the only party mistaken."

II.

The decision of the Circuit Court of Appeals is in conflict with its own prior decision. In the case of *Bonici* v. *Standard Oil Co.*, 103 Fed. (2) 437, where a seaman had given a release for personal injuries (similar in form to the release in the case at bar) it appeared that he had relied upon the advice of a physician which, though honestly made, was erroneous. The physician in that case was procured by the employer. The release was set aside.

In the instant case, the Circuit Court of Appeals, in reaching a contrary result, attempted to distinguish the *Bonici* case in two respects:

1. The physician in the case at bar was the plaintiff's physician.

2. Plaintiff was represented by an attorney in negotiating the settlement.

It is submitted that these so-called distinctions are erroneous and that the principle which applied to the *Bonici* case applies with equal force to the case at bar.

In the *Bonici* case the seaman relied upon a diagnosis honestly but erroneously made. His injuries were far more serious than the diagnosis showed. That release was set aside. Why? Because it would be inequitable to bar the seaman from recovering for his real injuries unknown to him at the time, and regarding which his suspicions, if any, were allayed by the physician's report. In the instant case the seaman was likewise misled, although innocently, by a physician's report. The report this time was not made by the employer's physician. It was not, however, made by plaintiff's physician as the Circuit Court of Appeals argued; it was not made by a physician of plaintiff's choosing, but by a doctor in a medical institution to which plaintiff was sent upon completion of his voyage. That incorrect report led to an inequitable result. Plaintiff, at the time he executed his release, was actually and permanently disabled through a skull and brain injury. He was assured by a hospital physician that the X-ray showed no fracture. His fears as to the extent of his injuries being thus removed, he settled his case for $180.

There is nothing in these simple facts to justify withholding relief from this plaintiff. Any other result would be grossly inequitable. True, the doctor involved did not represent the respondent as he did in the *Bonici* case. That is a distinction without a difference. The cases are in fact identical because in both the injured seaman was misled by a doctor's report. The principle of equity which applied to the *Bonici* case applies equally to the case at bar.

But, the Circuit Court of Appeals says, plaintiff was represented by a lawyer when he negotiated the settlement. So he was. The lawyer, however, was not a physician. He knew no more of the real extent of the injuries

than his client. To the lawyer, as well as the client, the hospital report meant that there was no sign of a skull fracture. The presence of the lawyer upon the execution of the release would be of importance only if there were a claim of misrepresentation or overreaching by respondent. No such claim is made. The presence of the lawyer, therefore, creates no distinguishing feature between the *Bonici* case and the case at bar.

To hold in the case at bar that petitioner did not care whether the doctor was right or wrong as to the skull fracture, would be contrary to ordinary human actions. To say as a matter of law that he is presumed not to have cared, is a monstrous proposition.

III.

The decision of the Circuit Court of Appeals is in direct conflict with the decisions in other Circuits.

In the case of *Tulsa City Line, Inc.* v. *Mains,* 107 Fed. (2) 377 (C. C. A. Tenth Circuit) a release similar to the one in the case at bar was executed, plaintiff acting upon statements both by his physician and defendant's that the injuries were slight. The Court there held that despite the broad language of the release, only minor injuries were in the minds of the parties, and that with respect to the fact that plaintiff had the advice of her own physician as well as the advice of defendant's physician, it was immaterial from what source the information came which induced the mistake. It is significant that in that case, also, the plaintiff was represented by an attorney in negotiating the settlement.

In *Great Northern Railway Co.* v. *Reid,* 245 Fed. 86 (C. C. A. Ninth Circuit), a railway employee released what he thought was a claim for trifling injuries, for $10.

The release did not specify the injuries, but was general in its terms, and covered present and future demands. The employee had been examined by the company's physician. His injuries later proved to be serious. After commenting upon the fact that the release was in form "as broad as it could be made" that court said (245 Fed. at p. 89):

> "In such a release, however, the general language will be held not to include a particular injury, then unknown to both parties, of a character so serious as clearly to indicate that, if it had been known, the release would not have been signed. This was a conclusion reached in *Lumley* v. *Wabash Railway Co.* (C. C. A. Sixth Circuit), 76 Fed. 66."

The case at bar is stronger than any of the cases cited because here petitioner (and respondent) not only had no thought of a skull fracture and permanent brain injury in mind in executing the release, but had been definitely assured by a physician that no such injury existed. It makes for no legal difference, as the *Tulsa* case (*supra*) pointed out, what physician made the mistake.

Conclusion.

It is respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers in order that the law on this important question may be definitely settled and that uniformity of decision between the Circuit Courts be established, and to that end that a Writ of Certiorari be granted.

Respectfully submitted,

WILLIAM MACY,
Counsel for Petitioner.

Supreme Court of the United States

October Term, 1940.

No. 507.

ATANASIO SITCHON,
Petitioner (Plaintiff),

vs.

AMERICAN EXPORT LINES, INC.,
Respondent (Defendant).

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

WILLIAM MACY,
Counsel for Petitioner.

LODER APPEAL PRESS, INC., 65-67 Duane St., N. Y. C. Tel. WOrth-2-0689

Supreme Court of the United States

OCTOBER TERM, 1940.

ATANASIO SITCHON, *Petitioner (Plaintiff)*, vs. AMERICAN EXPORT LINES, INC., *Respondent (Defendant)*.	No. 507.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

There are three subjects argued in respondent's brief which require brief discussion, hence this reply memorandum.

I.

Respondent, on page 2 of its brief, contends that the record does not justify the construction which petitioner places upon the facts. The Circuit Court of Appeals thought it did, for in its opinion it said (R. 72):

> "The question before us is whether a seaman acting under the advice of counsel may execute a binding release specifically covering known and unknown injuries, illnesses and disabilities which will preclude him from afterwards avoiding the release and suing upon his claim if he discovers that both

> he and the party against whom the claim existed were mistaken at the time he gave the release as to the extent of his injuries."

II.

On page 5 of its brief, respondent argues that the release is governed by the New Jersey law. This contention, also, is answered by the Circuit Court opinion (R. 75):

> "The law of New Jersey is apparently in accord with the result we have reached though that fact is really unimportant where the question is one affecting the rights of a seaman under the maritime laws. That is one which the United States courts have to answer."

III.

Likewise on page 5 of its brief, respondent urges that the question presented is not of sufficient public importance.

This respondent evidently feels differently on this subject than did the defendant in the *Bonici* case, which petitioned for a writ, submitting a brief in which the importance of the question, both to the employer and to seamen, was argued at length. Its petition was denied (308 U. S. 560) only, apparently, upon the ground that the question involved had become academic because the judgment was paid in the interim.

Respectfully submitted,

WILLIAM MACY,
Counsel for Petitioner.

(November, 1940.)

Supreme Court of the United States

OCTOBER TERM, 1940

No. 507

ATANASIO SITCHON,
Petitioner (Plaintiff),

against

AMERICAN EXPORT LINES, INC.,
Respondent (Defendant).

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KENNETH GARDINER,
Counsel for Respondent.

ARTHUR O. LOUIS,
JAMES M. ESTABROOK,
Of Counsel.

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ATANASIO SITCHON,
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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

The complaint, setting forth a claim for damages for personal injuries, was dismissed on the merits in the District Court for the Southern District of New York upon granting of respondent's motion for summary judgment predicated on proof that petitioner, under the advice of counsel, had executed a general release prior to the institution of the suit. The Circuit Court of Appeals for the Second Circuit unanimously affirmed. The opinion of the District Court is printed at pages 52-62 of the record and the opinion of the Circuit Court of Appeals is reported in 113 F. (2d) 830.

The Question Involved

Petitioner's statement, purporting to set forth the "Question Raised by the Case" at pages 4 and 5 of the petition herein, incorporates statements that the petitioner was *advised* by a Marine Hospital that there was no *sign* of a skull fracture and that the hospital diagnosis was inaccurate. The record does not support those statements. The question should have been stated as follows:

> May a seaman, *acting upon the advice of counsel during three months of negotiation,* execute a general release, the nature and purport of which the releasor admits he knew, and which release specifically included *known* and *unknown* injuries, thereafter repent of his bargain and avoid the legal effect of the release on his assertion he did not know the nature and extent of his injuries?

It should be borne in mind that the respondent did not provide the medical and surgical care and had no connection with the physicians who treated and examined the petitioner. The petitioner procured and submitted to the respondent, prior to the execution of the release, reports of the physicians who treated him. These reports contained diagnoses which were substantially the same as the diagnoses made by the physicians who examined the petitioner after the release was given. The petitioner specifically admitted that there was no fraud, deceit, compulsion or overreaching conduct on the part of the respondent.

The Facts

Petitioner, a seaman, age 40 (R., 14), an American citizen with some intermediate schooling and service in the United

States Army and Navy (R., 33), alleging he suffered personal injuries on June 10, 1938 while employed on respondents's vessel, the s/s Exchange (R., 6, 33), retained counsel to prosecute his claim for damages.

On August 19, 1938, his attorney initiated settlement negotiations prior to commencing suit (R., 6, 7, 10, 11). Thereafter there were a number of conferences between petitioner's attorney and a representative of respondent relating to the merits of the claim (R., 7, 13), petitioner's counsel obtaining and submitting to respondent's representative abstracts of the record of the United States Marine Hospital (R., 20), and stressing, particularly, the fact that the record disclosed injury to the skull (R., 21). During this period petitioner himself believed his condition was getting worse (R., 22). Respondent did not procure a physical examination (R., 20), nor was it represented by counsel during the negotiations (R., 24). Respondent's representative, to dispose of the claim for all time, and having in mind the possibility of being confronted with claims of head or brain injury where seamen contend they have been struck in the head, raised his prior offer of settlement to $180 (R., 21).

On November 14, 1938, the claim, after three months of negotiation, was settled (R., 11) within the State of New Jersey (R., 7, 17). An attorney attended on behalf of petitioner and witnessed the execution, by petitioner, of a special form of general release (R., 14-17). Petitioner was not deceived or misled as to the nature and effect of the release and he understood he finally and completely disposed of his claim, and that he would have no further right to seek additional damages and maintenance and cure (R., 7, 8, 9, 12, 13, 40, 41). Petitioner admits there was no fraud, deceit, compulsion or overreaching conduct in arriving at the settlement with him or in his execution of the release (R., 34, 40).

Petitioner's care at the Marine Hospital terminated on October 31, 1938, and he did not re-enter the hospital until May 8, 1939 (R., 25). On June 29, 1939 this action was commenced (R., 4).

The petition and accompanying brief contain statements that it was "represented" to the petitioner and that he was "told," "advised" and "assured" by a hospital physician that the X-ray, taken prior to the execution of the release, showed no fracture. There is no such proof in the record. Also, the record is clear that, as late as June 14, 1939, there was no retraction of the brain and no other abnormality except a faint widening in the mid-parietal region of the skull (R., 30). On the other hand, the record establishes that the Roentgenologist who examined the X-ray films made in July, 1939 (after the release was executed and after this suit was commenced), found substantially the same condition as did the Roentgenologist who, in August, 1938, examined the films of that date, which was prior to the date the settlement was consummated and the release signed (R., 32). The reference in the July, 1939 hospital record (R., 29) to the faint widening of the fronto-parietal suture as *probably* due to slight diastasis or diastatic fracture, can be misleading inasmuch as diastasis is defined surgically as "a separation of bones without fracture; dislocation" (R., 25).

Furthermore, the District Judge, on December 22, 1939, and before the motion for summary judgment was decided, granted leave to petitioner's attorney to submit affidavits *of physicians who treated him,* namely, the doctors at the Marine Hospital, on the question of whether petitioner was suffering from a fracture of the skull (R., 28). This was not availed of, petitioner instead merely submitting the affidavit of a new physician who saw petitioner for the first time on December 27, 1939 (R., 48). It is a fair inference

that the doctors at the Marine Hospital would not support the petitioner in his claim of fracture of the skull and brain injury.

On the record thus established, the District Court held that the release barred the suit and granted summary judgment in favor of respondent, which was unanimously affirmed by the Circuit Court of Appeals.

POINT I

No principle is involved, or issue presented, which this Court should review or pass upon.

(a) No Great Public Question Is Involved

The law of New Jersey as to the effect of a release in personal injury actions is not a great public question.

Petitioner seeks to review an order sustaining a release openly and fairly entered into by a seaman in the State of New Jersey. Under the decision of *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, the law of New Jersey is applicable, and under New Jersey law the release must be sustained.

In *Spangler* v. *Kartzmark,* 121 N. J. E. 64, 187 A. 770, the Court said (p. 772):

> "The great weight of authority supports the doctrine that a release of a claim for personal injuries cannot be avoided merely because the injuries proved more serious than the releasor, at the time of executing the release, believed them to be. Annotation, 48 A. L. R. at page 1464."

(b) There Is No Conflict Among the Circuits

All of the cases cited by petitioner, both in the petition and throughout the course of this litigation, are readily distinguishable in that in no case was a release set aside except when the plaintiff was either not represented by counsel or defendant's physician had participated in a wrongful determination of the extent of the injury.

Tulsa City Lines, Inc. v. *Mains,* 107 F. (2d) 377 (C. C. A. 10), is the only case petitioner has cited where a court upset the release of a plaintiff who had been represented by an attorney. It expressly follows *Erie Railroad Co.* v. *Tompkins, supra,* and is limited to a statement of the law of Oklahoma, where the release was given.

Great Northern Ry. Co. v. *Reid,* 245 F. 86 (C. C. A. 9), concerned the giving of a release in Montana, the same day as the accident, after erroneous statements by the defendant's doctor, and at a time when the plaintiff did not comprehend the nature of his act in signing the release.

Bonici v. *Standard Oil Co. of New Jersey,* 103 F. (2d) 437 (C. C. A. 2), was clearly distinguished by the same court in the present case, because Bonici, the plaintiff, was not represented by counsel and was also misled by the incorrect advice of defendant's physician.

POINT II

The decision of the Circuit Court of Appeals is in accord with both recognized public policy and the established authorities.

(a) Public Policy

As Judge CLARK said in *Bonici* v. *Standard Oil Co. of New Jersey, supra* (p. 439):

> "'* * * one who claims that a seaman has signed away his rights to what in law is due him must be prepared to take the burden of sustaining the release as fairly made with and fully comprehended by the seaman' (*Harmon* v. *United States,* 5 Cir., 59 F. 2d 372, at p. 373), nevertheless a release fairly entered into and fairly safeguarding the rights of the seaman should be sustained. *Any other result would be no kindness to the seaman, for it would make all settlements dangerous from the employer's standpoint and thus tend to force the seaman more regularly into the courts of admiralty.*" (Italics ours.)

Also, in *Harmon* v. *United States,* 59 F. (2d) 372 (C. C. A. 5, 1932), the Court said, in sustaining a seaman's release (p. 373):

> "A release of a claim to a matter in or about to be in litigation 'is of the highest significance in general when it appears that the situation and circumstances of the parties show that it has been entered into with an understanding of the rights of the parties respectively, and with intent to include all matters of difference between them.' *Union Pacific R. Co.* v. *Harris,* 158 U. S. 326, * * *."

(b) The Authorities

We repeat that petitioner has cited no cases where a release was set aside in a personal injury suit, except where the plaintiff was either not represented by counsel or had been persuaded by an erroneous report from the defendant's physician. While this distinction disposes of petitioner's authorities, still in *Texas & Pacific Ry. Co.,* v. *Dashiell,* 198 U. S. 521, the release was by its own words limited to certain specified injuries.

In *Rosenblum* v. *Manufacturers Trust Co.,* 270 N. Y. 79, the Court was not considering a release or other form of

contract between two parties, each of whom had given consideration, but a voluntary declaration of trust, which, it was held, could be rescinded because of a mistake on the part of the person creating the trust.

In *Moffett, Hodgkins & Clarke Co.* v. *Rochester,* 178 U. S. 373, this Court held merely that an offer to contract could be modified by the person making the offer before the offer was accepted, and did not deal in any way with the right of a party to rescind a contract, such as a release, after the offer had been accepted and the consideration had passed.

Among the cases involving releases in personal injury and death actions, unsuccessfully attacked on the ground there was a mistake of fact as to the identity, character and extent of the injuries, or that unknown or unanticipated injuries developed, or that the sum received was inadequate, or that there was fraud, are:

Cogswell, Ex'r. v. *Boston & Maine R. R. Co.,* 78 N. H. 379, 101 A. 145;

Spangler v. *Kartzmark, supra*;

Morris v. *Seaboard Air Line Ry.,* 23 Ga. App. 554, 99 S. E. 133;

Berry v. *Struble,* 20 Calif. App. (2d) 299, 66 P. (2d) 746 (1st App. Dist. Calif.);

Great American Indemnity Co. v. *Blakey,* 107 S. W. (2d) 1002 (Tex. Civ. App.) (Releasor represented by counsel);

Lynch, Adm'r. v. *Newman,* 37 N. J. L. J. 17;

Fivey v. *Pennsylvania R. R. Co.,* 38 Vroom (N. J.) 627;

Harmon v. *United States, supra* (Releasor represented by counsel);

Texas & New Orleans R. Co. v. *Hawkins,* 112 S. W. (2d) 1107 (Tex. Civ. App.) (Releasor represented by counsel);

Texas Employers Ins. Assn. v. *Arnold,* 114 S. W. (2d) 636 (Tex Civ. App.) (Releasor represented by counsel).

CONCLUSION

The petition should be denied.

Respectfully submitted,

KENNETH GARDNER,
Counsel for Respondent.

ARTHUR O. LOUIS,
JAMES M. ESTABROOK,
Of Counsel.